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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-622

SOL MARGOLIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The court of appeals wrote no opinion; its order affirming the conviction (Pet. App. A) is reported at 483 F. 2d 1399.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1973. The petition for a writ of certiorari was filed on October 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1955 constitutes a valid exercise of congressional power.

2. Whether in this case the government established a violation of Section 1955.

3. Whether the affidavit supporting the application for the wiretap order, or the wiretap order, itself, was invalid.

4. Whether the name of a government informant should have been revealed at trial.

5. Whether the indictment and punishment for violation of both 18 U.S.C. 371 and 1955 was improper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on two counts charging that they conducted an illegal gambling business and conspired to do so, in violation of 18 U.S.C. 1955 and 371. Petitioners Ciriello, Bisaccia, Felice, Muscenti and McCauley were sentenced to three months' imprisonment on Count 1 and five years' probation on Count 2, with fines ranging from $500 to $2,000; petitioner Margolis was sentenced to six months' imprisonment on Count 1 and five years' probation on Count 2, with a $10,000 fine. The court of appeals affirmed without opinion (Pet. App. A).

Petitioners operated an unlawful gambling business from three locations in Yonkers, New York. The business was run by Margolis from the back room of a grocery store manned by Ciriello; the grocery was owned and run by Bisaccia. Ciriello, Bisaccia, Felice, Muscenti and McCauley took bets for the business at an athletic club, a social club and the grocery store.

Muscenti, Felice and McCauley accepted bets on sporting events and horse races at the athletic club and the social club. Information on the betting line odds could be obtained and the bets placed on a cash or credit basis with any of the three, but Felice most often paid the winning bettors. Bets on the numbers as well as sporting events and horse races were accepted by Ciriello and Bisaccia on both a cash and credit basis at the grocery store (Tr. 28–105).[1]

Telephone conversations from an unlisted phone at the grocery store and a telephone at the athletic club, recorded pursuant to court authorization during a fourteen day period in March 1972, disclosed the nature and extent of the gambling business. Using the code name "George," Margolis regularly called Ciriello at the grocery to provide and discuss the betting line for the day and receive reports on betting activity. After speaking with Margolis, Ciriello would call Felice, Muscenti, or McCauley to give them the betting odds for the day, so that all outlets of the business would be using the same line. Both Ciriello and Bisaccia used the telephone to give the betting line to, and take bets from, unidentified individuals on numbers, sporting events and horse races. The intercepted calls at the athletic club involved McCauley and Felice giving the line to callers and accepting bets from them. Based upon intercepted telephone calls on two days at these two locations, Special Agent Whitcomb of the Federal Bureau of Investigations calculated that the amount wagered on March 11, 1972, was at least

[1] "Tr." refers to the transcript of the trial proceedings.

$3,300 and the amount wagered on March 18, 1972, was $1,880 (Tr. 259–260, 280–281, 288–328; GX 1–36, 38–39).[2]

The gambling activity at the grocery store was also under visual surveillance. On one occasion, Bisaccia was overheard talking about a numbers bet with an unidentified party in the front of the store. On other occasions, Muscenti was observed in the grocery for approximately eight minutes (Tr. 195–197, 216–223; GX 53).

Gambling records bearing the names of McCauley and Felice and containing the fingerprints of Ciriello were seized at the grocery store when Ciriello was arrested there with $923 in cash in his possession. Records at the grocery store also contained the telephone number and address of Margolis. Similar gambling records, bearing the fingerprints of Muscenti, were found at the social club when Muscenti was arrested there. Based upon the records seized, Agent Whitcomb calculated that the amount wagered that day was $3,700 (Tr. 236–247; GX 1A, 42–52).

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1955 is unconstitutional because it constitutes an impermissible invasion of the powers reserved to the states.

The constitutionality of 18 U.S.C. 1955 has been sustained under principles announced in *Perez* v. *United States*, 402 U.S. 146, by every court of appeals that has considered the issue. See *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), petition for certiorari

[2] "GX" refers to government exhibits at trial.

pending, No. 72–158; *United States* v. *Harris*, 460 F. 2d 1041 (C.A. 5), petition for certiorari pending, No. 72–87; *Palmer* v. *United States*, Nos. 71–1596 and 71–1597 (C.A. 6), decided March 31, 1972, certiorari denied, 409 U.S. 874; *United States* v. *Riehl*, 460 F. 2d 454 (C.A. 3); *Schneider* v. *United States*, 459 F. 2d 540 (C.A. 8), certiorari denied, 409 U.S. 877. These cases stand for the proposition that Section 1955 is within Congress's power under the commerce clause to control intrastate activities affecting interstate commerce and that Congress's findings[3] are adequate to support its conclusion that syndicated gambling provides substantial revenues for organized crime, which in turn affects interstate commerce. There is no reason to depart from that rationale here.

Petitioners argue that 18 U.S.C. 1955 is unconstitutional as a bill of attainder because it substitutes a legislative finding of probable cause for the required judicial finding, and because it includes a violation of state criminal laws as an element of the offense.[4] Simi-

[3] In the Statement of Findings and Purpose made prior to the passage of the Organized Crime Control Act of 1970, Congress declared that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling * * *" (84 Stat. 922–923). Relying upon cases decided under 18 U.S.C. 1952, petitioners also argue that the government must prove an "octopus-like" gambling operation with interstate connections in addition to the statutory elements of the crime. It is settled, however, that no such proof is required under Section 1955. *Becker*, *supra*; *Schneider*, *supra*; *United States* v. *Ceraso*, 467 F. 2d 653 (C.A. 3).

[4] There is no claim here, nor was any made at trial, that the evidence was insufficient to show that the gambling business was in violation of New York law.

lar contentions were fully answered in our brief in opposition in *Palmer* v. *United States*, No. 72–2, October Term, 1972, certiorari denied, 409 U.S. 874, a copy of which we are providing to counsel for petitioners.

2. Petitioners argue that their gambling activities were not part of the single operation involving five or more persons contemplated by Section 1955, but constituted several distinct gambling enterprises.

The evidence clearly established, however, that all of the petitioners were involved in a single gambling operation. The recorded telephone conversations and the testimony of the bettors demonstrated that all the defendants except Margolis were accepting bets at three locations—the grocery store, the athletic club and the social club. The interceptions revealed that Margolis supplied the gambling line to Ciriello at the grocery store, which was owned by Bisaccia, that Ciriello in turn passed it on to Felice, Muscenti and McCauley, and that Margolis and Ciriello were in continuous contact with regard to the gambling business.

Certain intercepted telephone conversations further illustrate the interrelationship of the defendants. On March 10, McCauley told a bettor that he would check with Felice before he accepted a wager. On March 12, Ciriello and Felice, and then Ciriello and Margolis, discussed whether a bettor was entitled to be paid on a particular wager. On March 15, Margolis congratulated Ciriello on "finally" learning the business. On March 18, Bisaccia discussed a problem involving a betting slip with one of the numbers runners, Mar-

garet Twyne. Within twenty minutes, Ciriello directed the manner in which that betting slip was to be handled in a call to Muscenti.

The extent of the gambling activity revealed by the fourteen days of wire interception, together with the testimony of the individual bettors who had been placing bets with petitioners for several years, was more than sufficient to establish that the gambling operation had continued for a period exceeding 30 days, as required by Section 1955. In any event, that element of the crime was fully satisfied by meeting the alternative requirement that the proof show the receipt of $2,000 in a single day. Agent Whitcomb added up the wagers placed over the recorded telephone conversations on March 11, 1972, and found that the total was at least $3,300.

Petitioners further contend that their conduct does not fall within the purview of Section 1955 because "there must be some supervisory or managerial control in order to properly come within the five-man minimum standard which is required for federal jurisdiction" (Pet. 4). However, every court of appeals that has dealt with the question of the scope of the conduct proscribed by Section 1955 has held that the phrase "whoever conducts"[5] includes employees such as "runners," "agents," and clerks.

[5] Section 1955 (a) provides:

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

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See *Becker, supra; Harris, supra; Riehl, supra; Schneider, supra.*[6]

3. Petitioners urge that the affidavit of Agent Fraumann of the F.B.I. (App. A, *infra*) supporting the application for a wire interception order and the order itself were fatally defective, on the ground that the affidavit did not establish probable cause and did not meet the requirements of 18 U.S.C. 2518(1)(c) that it show that other investigative procedures had been tried and had failed.

The Fraumann affidavit based the application for a wire interception order upon information obtained from a reliable informant and corroboration of that information by surveillance and other investigative techniques. The informant had previously provided detailed information on gambling activities over a two year period, which had been corroborated by FBI agents, and in one instance had supplied information which was corroborated by electronic surveillance. The informant stated that he had personally placed bets on the telephone with Felice, McCauley and Muscenti at the athletic club and with Ciriello at the grocery store. He also had observed Bisaccia take bets in the front room of the grocery store, while Ciriello used a tele-

[6] *United States* v. *Bass*, 404 U.S. 336, and *Rewis* v. *United States*, 401 U.S. 808, relied on by petitioners, are inapposite. *Bass* was decided on the basis of an ambiguous reference to interstate commerce in the statute, 18 U.S.C. App. 1202(a)(1). Similarly, in *Rewis*, the question was whether the interstate travel of customers of the gambling establishment satisfied the requirement of 18 U.S.C. 1952 with respect to travel in, or use of a facility in, interstate commerce; it had nothing to do with participation in illegal enterprise under Section 1955.

phone in the back room. The informant reported on a conversation with Felice and Ciriello at which he was told that Muscenti, McCauley and Bisaccia assisted them in the gambling operation. The informant also stated that from personal observations, as well as conversations with Felice and Ciriello, there was wagering in an amount far in excess of $2,000 a day.

While they were receiving this information, FBI surveillance agents observed Ciriello at the grocery store for almost three months and, on one occasion, observed Ciriello in the back room of the store for a five minute period when he received four or five brief telephone calls. They also overheard a conversation between Bisaccia and an unidentified person in the front room of the store regarding a bet on numbers. On one occasion Muscenti was observed visiting the grocery store. FBI investigation also disclosed that the telephone number used by the informant to place bets with Ciriello at the grocery store was unlisted, and that Ciriello, Bisaccia, Felice and Muscenti had been previously arrested for violations of the gambling laws. These circumstances, recited in the Fraumann affidavit, clearly established probable cause for the issuance of the wire interception order. See *United States* v. *Manning,* 448 F. 2d 992 (C.A. 2; en banc), certiorari denied, 404 U.S. 995; *United States* v. *Gardner,* 436 F. 2d 381 (C.A. 2); *United States* v. *Dunnings,* 425 F. 2d 836 (C.A. 2), certiorari denied, 397 U.S. 1002.

The Fraumann affidavit also stated that the informant was unwilling to testify against any of the five

persons because he feared for his personal safety and that surveillance had failed to provide sufficient evidence for a successful prosecution, or to identify all of the participants in the gambling operation and determine the precise manner of its operation. Based on his experience in investigations of gambling offenses, the agent also concluded that the telephones would be an essential feature of this type of gambling operation. The trial court's decision to uphold the sufficiency of the affidavit under Section 2518(1)(c) was thus proper. See *United States* v. *Mainello*, 345 F. Supp. 863 (E.D. N.Y.); *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal.).

Petitioners also contend that the wire interception order was invalid "because the persons whose conversations were to be monitored, and the types of conversations to be seized were not described with sufficient particularity" (Pet. 22).[7] The language of the order clearly refutes that contention (App. B, *infra*). Five of the six petitioners were named in the order. All known persons were identified to the greatest extent possible.

The type of conversation to be intercepted was limited by the terms of the order to conversations con-

[7] 18 U.S.C. 2518 provides in part:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted.

* * * * *

"(c) a particular descriptiono f the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;"

* * * * *

cerning violations of 18 U.S.C. 1955. This was further clarified by the court's statement of the objectives to be achieved, *i.e.*, the manner of the individuals' participation, identities of confederates, places of operation, and nature of the conspiracy. The court also ordered that, prior to the interception, physical surveillance must establish the presence of the named subjects; that interception should be discontinued when none of the named subjects was a party to the conversations; that interception should begin as soon as practicable and terminate "upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days"; and that reports on the progress that "has been made toward achievement of the authorized objective and the need for continued interception" should be made to the court on the fifth and tenth days following the date of the order. This was the greatest degree of particularity possible with respect to the type of communications and satisfied the particularity requirement. See *Berger* v. *New York*, 388 U.S. 41, 57; *Osborn* v. *United States*, 385 U.S. 323, 330.

Although petitioners assert that 19 U.S.C. 2515–2518 are unconstitutional, they do not present argument on the issue or even specify the provisions of the constitution allegedly violated.[8] We note that the consti-

[8] Petitioners contend that the issue is already before this Court in *United States* v. *Giordano*, certiorari granted, March 26, 1973, No. 72–1057; *United States* v. *Chalmas*, 468 F. 2d 234 (C.A. 9); and *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), petition for certiorari pending, No. 72–158. Petitioners are incorrect. The constitutionality of 18 U.S.C. 2515–2518 is not at issue in *Giordano* or *Becker*, and certiorari has not been sought in *Chalmas*.

tutionality of the statute has been repeatedly and consistently upheld. See, *e.g.*, *United States* v. *Cox*, 462 F. 2d 1293 (C.A. 8); *United States* v. *Becker*, *supra*; *United States* v. *Cox*, 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *Forcarile*, 340 F. Supp. 1033 (D. Md.); *United States* v. *LaGorga*, 336 F. Supp. 190 (W.D. Pa.); *United States* v. *Perillo*, 333 F. Supp. 914 (D. Del.); *United States* v. *Leta*, 332 F. Supp. 1357, 1359–1361 (M.D. Pa.); *United States* v. *Scott*, 331 F. Supp. 233, 238–241 (D. D.C.); *United States* v. *Cantor*, 328 F. Supp. 561 (E.D. Pa.); *United States* v. *Sklaroff*, 323 F. Supp. 296 (S.D. Fla.).

4. Relying on *Roviaro* v. *United States*, 353 U.S. 53, petitioners argue that the identity of the informant upon whom the government relied in obtaining the wire interception order should have been disclosed at trial. Although this Court in *Roviaro* declared that there was "no fixed rule with respect to disclosure" and that the "problem is one that calls for balancing" (353 U.S. at 62), petitioners do not indicate the manner and the extent to which their case was prejudiced by non-disclosure. On the other hand, the reasons for non-disclosure of the informant's identity are well established in the record. Fraumann's affidavit asserted that the informant was unwilling to testify because he feared for his personal safety.

Moreover, *Roviaro* is clearly distinguishable. There, "the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify

or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe [informer] denied knowing petitioner or ever having seen him before." *Roviaro, supra,* 353 U.S. at 64–65. Here, the informer's testimony is not important to the defense. Unlike the situation in *Roviaro,* the informer here did not play a central or even a significant role in the criminal activity. In fact, there is no reason to believe (nor is one alleged) that testimony by the informer would have shed any further light on the case.

5. Petitioners contend that they were improperly indicted and convicted for conspiracy to violate 18 U.S.C. 1955, since concerted action by five persons is an element of the substantive offense.* In our response in *Iannelli* v. *United States,* No. 73–64, we pointed out that since the substantive offense may be committed without a conspiracy being formed (*i.e.,* by a single gambling operator who used four or more innocent persons to collect receipts), each offense involves an element not required by the other, and it is therefore proper to charge and punish each separately. Here, as in *Iannelli,* the indictment charged that more than the five persons necessary to constitute the substantive of-

*This contention is known as "Wharton's Rule." It has been described as follows:

> "[W]here it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute." [*Gabardi* v. *United States,* 287 U.S. 112, 122.]

fense were also involved in a conspiracy. Thus, "Wharton's rule" should not apply in any event. See *United States* v. *Becker, supra.*

In *Iannelli* and other cases we recognized, however, that there is a conflict between the circuits on this issue. In *United States* v. *Hunter,* 478 F. 2d 1019, certiorari denied, No. 73-101, October 9, 1973, the Seventh Circuit declined to follow the decision in *Becker* and reversed a conviction for conspiracy to violate 18 U.S.C. 1955. We acquiesced in the granting of certiorari in *Iannelli* because of the conflict in the circuits and the significance of this issue to the interpretation of 18 U.S.C. 1955. Since the identical issue is before this Court in *Iannelli,* the Court may wish to defer disposition of the instant case pending disposition of *Iannelli.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied, or, in the alternative, that disposition of the petition be deferred pending disposition of *Iannelli.*

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

APPENDIX A

United States District Court, Southern District of New York

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

Edwin H. Fraumann, Special Agent, Federal Bureau of Investigation, New York, New York, being duly sworn, states:

1. I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. This affidavit seeks authorization to intercept wire communications concerning an offense involving a violation of Section 1955, Title 18, United States Code and a conspiracy to violate that statute which has been and is being committed by EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY MC CAULEY and others as yet unknown.

3. I have supervised the investigation of the offense and as a result of my present participation in this investigation and of reports made to me by agents under my direction, I am familiar with all circumstances of the offense. On the basis of that familiar-

ity, I allege the facts contained in the numbered paragraphs below to show that:

a. There is probably cause for belief that EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, JOHNNY MC CAULEY, FRANK MUSCENTI and others presently unknown, have been and are now committing offenses involving an illegal gambling business which has a gross revenue in excess of $2,000 in a single day, with intent to carry on the offense of wagering on sports events and horse races in violation of New York State Penal Law, Section 225.10, and are, thereby, in violation of Section 1955 of Title 18, United States Code.

b. There is probable cause for belief that evidence of this offense will be obtained through the interceptions of wire communications, authorization for said interceptions being herein applied for;

c. Normal investigative procedures reasonably appear unlikely to succeed;

d. There is probably cause for belief that the telephones bearing the following numbers have been used, are being used and will be used in carrying out the offenses mentioned in paragraph 3(a) above, all of which appears more fully hereafter:

(914) 476-5926, a telephone located in the Waverly Food Market, 177 Waverly Street, Yonkers, New York.

(914) 969-8401, a semi-public, coin-operated telephone located in Jim's Athletic Club, 163 Willow Street, Yonkers, New York.

The records of the New York Telephone Company as checked on February 15, 1972, reveal that the telephone number (914) 969-8401 is a semi-public, coin operated telephone listed to Jim's Athletic Club, 163 Willow Street, Yonkers, New York. They advised the telephone bills are sent to and paid by GEORGE

MC CAULEY, 163 Willow Street, Yonkers, New York.

On February 22, 1972, the Yonkers Police Department check revealed there was nothing in their records on GEORGE MC CAULEY.

The records of Consolidated Edison were checked on February 15, 1972, and reveal that Mr. GEORGE MC CAULEY pays their bills for Jim's Athletic Club, 163 Willow Street, Yonkers, New York.

The records of the New York Telephone Company, checked on February 15, 1972, reveal that the telephone number (914) 476-5926 is a touch non-listed phone subscribed to the Waverly Food Market, 177 Waverly Street, Yonkers, New York. The telephone bills are sent to and paid by ROCCO BISACCIA, 177 Waverly Street, Yonkers, New York.

On February 23, 1972, a check was made of the Index of Assumed Business Names at White Plains, New York, which reflected the filing on June 7, 1956, of certificate dated May 15, 1956, by ROCCO BISACCIA of 16 Sprain Place, that he was conducting business under the name Waverly Food Market.

FACTS AND CIRCUMSTANCES

4. From experience in the investigation of gambling offenses, I know that a sizable bookmaking operation utilizes telephones for the purpose of conveying gambling information, i.e., the bets from the bettor to the bookmaker. Telephones are also utilized by the bookmaker for the purpose of obtaining race results and sports scores. The bookmaker also must balance his books, that is, he retains bets only in the same approximate amounts on all participants in athletic events or horse races to avoid suffering losses.

5. In order to balance his books, the large-scale bookmaker must reinsure himself when he takes bets

on a favorite in excess of those placed on the remainder of participants in the contest by betting the heavily played item again with another bookmaker who is capable of accepting these bets. This operation is known as a "lay-off" and the bookmaker accepting these bets is known as a "lay-off man."

6. Information from a confidential informant of the Federal Bureau of Investigation and independent by Special Agents of the Federal Bureau of Investigation reveal as set forth in the following paragraphs that: EUGENE CIRIELLO and MARIO FELICE are active participants in a gambling enterprise in the Westchester County area of New York State, which gambling enterprise involves wagers on sports events, horse races and policy (numbers) betting. This gambling enterprise has several focal points where bets are received by CIRIELLO and FELICE and their assistants, both directly and over the telephone. These locations include the following:

> The Waverly Food Market, 177 Waverly Street, Yonkers, New York, and Jim's Athletic Club, 163 Willow Street, Yonkers, New York;

that FRANK MUSCENTI and JOHNNY MC CAULEY work as active bookmakers on CIRIELLO and FELICE'S behalf, at Jim's Athletic Club, where they accept policy (numbers) wagers;

that ROCCO BISACCIA works for CIRIELLO and FELICE at the Waverly Food Market by maintaining the appearance of an active food market, when actually the location's main business is that of accepting wagers on sporting events and horse races, and by receiving wagers on behalf of CIRIELLO and FELICE at that location. BISACCIA also acts as a "lookout" for the gambling operation.

7. A confidential informant of the Federal Bureau of Investigation who has been contacted on a regular

basis for the past two years, has furnished the Federal Bureau of investigation with detailed, reliable information concerning gambling activities. All prior information concerning gambling activities supplied by this informant has been corroborated by Special Agents of the Federal Bureau of Investigation, and informants information has previously led to a successful court-authorized electronic surveillance in a gambling operation.

This informant has been a bettor on horse races and sporting events for several years and this informant has personally placed bets as recently as February 23, 1972, with both FELICE, telephone (914) 969-8401 and CIRIELLO, telephone number (914) 476-5926. This informant described EUGENE CIRIELLO as five feet ten inches tall, 175 pounds, white race, male. Informant estimated his age as about 54 years. Informant stated CIRIELLO works in the back room of the Waverly Food Market. This same informant described MARIO FELICE as about 57 years old, white race, dark complexion, approximately five feet six inches tall, weighing about 195 pounds. During the past year, this informant has placed wagers both directly in the Waverly Food Market and Jim's Athletic Club by telephonically calling the Waverly Food Market over telephone number (914) 476-5926, or Jim's Athletic Club over telephone number (914) 969-8401.

8. On January 24, 1972, and on February 23, 1972, this same confidential informant stated that EUGENE CIRIELLO maintains a sports gambling operation which has numerous runners and that MARIO FELICE handles the numbers operation. This information has been told to the informant by EUGENE CIRIELLO and MARIO FELICE during the month of December 7, 1971, and he has continued to be in con-

tact with them and this information is current as of February 23, 1972. In addition, the informant has observed EUGENE CIRIELLO and MARIO FELICE in the conduct of their gambling operations from December, 1971 up to and including February 23, 1972, on a weekly basis. Also, EUGENE CIRIELLO and MARIO FELICE stated to the informant during December, 1971, that they are helped in the running of their operation by FRANK MUSCENTI, JOHNNY MC CAULEY and ROCCO BISACCIA.

9. This informant stated that he knows that EUGENE CIRIELLO's and MARIO FELICE's gambling operation include the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and Jim's Athletic Club, 163 Willow Street, Yonkers, New York, through conversations he has had with CIRIELLO and FELICE and others who are known to him as bettors during January and the first week of February, 1972.

10. During the course of the past two months, this same informant states he has placed bets in the Waverly Food Market and Jim's Athletic Club over the telephone, by calling (914) 476–5926 and (914) 969–8401. As recently as the week of February 23, 1972, this informant has placed bets by calling (914) 476–5926 and (914) 969-8401. On each occasion, on (914) 476–5926, he would speak to EUGENE CIRIELLO. On each occasion that he would call (914) 969–8401, he would speak to MARIO FELICE, JOHN MC CAULEY or FRANK MUSCENTI.

11. On November 29, 1971, two Special Agents of the Federal Bureau of Investigation observed an individual come into the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and tell the man behind the counter, later identified as ROCCO BISACCIA, "the telephone number was no good

over 'Thanksgiving' ". "I'm throwing the numbers into the basket". BISACCIA attempted to stop the individual from talking about a telephone number while the agents were in the store.

At the same time that the agents were in the Waverly Food Market, they observed EUGENE CIRIELLO in the back room of the store near a telephone. During the five minutes the agents were in the store, they observed CIRIELLO receive four or five very brief phone calls.

12. Surveillances were conducted on the Waverly Food Market between November 17, 1971, through February 3, 1972, at which times EUGENE CIRIELLO was observed at the Waverly Food Market at various times between the hours of 12:00 Noon and 5:00 P.M.

During observations and conversations with EUGENE CIRIELLO during the period between December 16, 1971, and February 23, 1972, and by placing bets with EUGENE CIRIELLO between December 16, 1971, and February 23, 1972, the confidential informant advised that ROCCO BISACCIA runs the Waverly Food Market in the front room, checking on who comes into the store; and that EUGENE CIRIELLO is in the back room handling sports action over the phone (914) 476-5926 (non-listed). The confidential informant advised that the pay phone in the front room has an extension under the counter and is the listed phone for the Waverly Food Store, but that the gambling action is not taken over this phone.

On February 23, 1972, informant advised thru observations by him during the period from December, 1971 to February 23, 1972 he has observed that BISACCIA handles any bets placed by "walk in bettors" that come into his establishment and that

BISACCIA handles the phone if CIRIELLO has left the premises.

In addition, this same confidential informant advised that EUGENE CIRIELLO is involved with MARIO FELICE and shares a sports and numbers betting operation which from confidential informant's own observation and conversations with the principals handle in excess of $15,000 a day.

14. On November 11, 1971, FRANK MUSCENTI was observed by a Special Agent of the Federal Bureau of Investigation while on a day time photographic surveillance entering and leaving the Waverly Food Market.

15. Records of the Yonkers Police Department reveal that EUGENE CIRIELLO has two arrests, on April 18, 1964 and December 12, 1965, for bookmaking and possession of policy wagering material, and that at this same date, ROCCO MAURICE BISACCIA was arrested for keeping a gambling and betting establishment. FRANK MUSCENTI was charged with the possession of policy slips on September 9, 1965. On January 28, 1963, and September 9, 1965, MARIO JAMES FELICE was arrested for possession of bookmaking records and operating and possession of policy slips. On February 22, 1972, a Yonkers Police Department records check on both JOHNNY MC CAULEY and GEORGE MC CAULEY revealed there were no criminal records on either.

NEED FOR INTERCEPTION

16. The above mentioned informant has stated that he is unwilling to testify against EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY MC CAULEY and others who operate or bankroll the bookmaking oper-

ations at the Waverly Food Market and Jim's Athletic Club, for fear of his personal safety.

Surveillance has been utilized but has failed to provide evidence of the offense sufficient to convict the participants, the identities of all conspirators or the precise manner of operation. This is a result of the secrecy surrounding the operation and the fact that most transactions appear to be made over the telephone.

17. For the reasons set forth in above paragraphs, all normal avenues of investigation and prosecution are closed and the only reasonable way to develop necessary evidence of a violation of federal gambling statutes by EUGENE CIRIELLO, MARIO FELICE, JOHNNY MC CAULEY, FRANK MUSCENTI, ROCCO BISACCIA and others from their base of operations is to intercept wire communications concerning their bets, "lay-off bets" and settlements made by gamblers and/or accomplices to and from telephone number (914) 969-8401 and (914) 476-5926.

18. No other application for authorization to intercept wire or oral communications from the above described persons, places or facilities is known to have been made.

19. Inasmuch as the gambling operation described herein is a continuing criminal conspiracy, the evidence sought through the interception of wire communications to and from telephone numbers (914) 969-8401 and (914) 476-5926 will be obtained on a continuing basis on several days succeeding the first reception of communications which is the subject of the request. It is requested, therefore, that these interceptions not cease after sought communications are first obtained, but that the interceptions continue until communications are obtained which reveal the full

and complete identities of all co-conspirators, the manner in which these conspirators participate in illegal gambling business and the full identities of their confederates, their places and methods of operation and the nature of the conspiracy involved therein or in to terminate fifteen days from the date of this order, whichever is earlier.

Section 803 of Title 18, entitled "Syndicated Gambling of the Organized Crime Control Act of 1970", Public Law 91–452, 91st Congress, approved October 15, 1970, amended Chapter 95, Title 18, United States Code, by adding a new section, Section 1955, Prohibition of Illegal Gambling Business. Section 801 of Title VIII of the act contains special findings that illegal gambling involves widespread use of and has an effect upon interstate commerce and the facilities thereof.

Wherefore, I submit that information supplied by reliable informants, by surveillances, and other records set forth in the preceding paragraphs provide sufficient evidence to establish probably cause that EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI JOHNNY MC CAULEY and others as yet unknown, are now committing an offense involving telephone numbers (914) 969–8401 and (914) 476–5926, which are part of a gambling operation in violation of Section 1955, Title 18, United States Code.

EDWIN H. FRAUMANN,
Special Agent,
Federal Bureau of Investigation.

Subscribed and sworn to before
me this ____ day of _____, 1972.

APPENDIX B

United States District Court, Southern District of New York

In the Matter of the Application of the United States for an Order Authorizing the Interception of Wire Communications

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

To: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Application under oath having been made before me by Patrick T. Burke, an attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown, have committed and are committing offenses listed in Section 2516 of Title 18, United States Code, involving the carrying on of an illegal gambling business by five or more persons, which illegal gambling business has a gross revenue in excess of $2,000 in a single

day, in violation of Title 18, United States Code, Section 1955 and are conspiring to commit such an offense in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, authorization for which is herewith applied. In particular, these wire communications will concern the transmission of gambling information relating to wagering on sports events and horse races and policy (numbers) the dissemination of such information to persons engaged in the unlawful business of gambling, and the participants in the commission of the above described offenses.

(c) normal investigative procedures reasonably appear to be unlikely to succeed.

(d) there is probable cause to believe that the telephones (914) 476–5926, a telephone located in the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and (914) 969–8401, a telephone located in Jim's Athletic Club, 163 Willow Street, Yonkers, New York, have been and are being used by EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown in connection with the Commission of the above described offenses.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry Petersen, who has been specially designated in this proceeding by the Acting Attorney General of the United States, the Honorable Richard G. Kleindienst, to exercise the powers conferred on the

Attorney General by Section 2516 of Title 18, United States Code, to:

(a) intercept wire communications of EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown concerning the above described offenses to and from the telephones (914) 476–6926, a telephone located in the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and (914) 969–8401, a telephone located in Jim's Athletic Club, 163 Willow Street, Yonkers, New York.

(b) such interception shall not automatically terminate when the type of communications described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the manner in which EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown participate in the illegal gambling business by five or more persons, which illegal gambling business has a gross revenue in excess of $2,000 in a single day, and which reveal the identities of their confederates, their places of operation and the nature of the conspiracy involved therein within the time restrictions ordered below, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED THAT, these interceptions over telephone (914) 969–8401 shall be limited to times during which it has been established by physical surveillance by Special Agents of the Federal Bureau of Investigation, that one or more of the aforementioned individuals is present in the premises where the telephone facility in use is located. And, that any interception shall be discontinued immediately upon the determination by voice identification or otherwise that

none of the named subjects is a party to the conversation.

PROVIDING ALSO THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of fifteen (15) days from the date of this order.

PROVIDING ALSO, that Patrick T. Burke shall provide the court with a report on the 5th and 10th day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

IT IS FURTHER ORDERED THAT the New York Telephone Company, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted, the furnishing of which facilities or technical assistance by the New York Telephone Company to be compensated for by the application at the prevailing rates.

Dated: New York, New York.

/s/ CAUELLA,
U.S. District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974